Supreme Court, U.S.
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No. 97-963

In The

Supreme Court of the United States

October Term, 1997

RHONDA WISLAND,

Petitioner,

vs.

ADMIRAL BEVERAGE CORPORATION and PAUL JAMES MAYER, IV,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

1. Are the decisions below proper?

2. Does this case present issues appropriate for this Court's review under a writ of certiorari?

PARTIES TO THE PROCEEDING

The Petitioner is an individual, as is the Respondent Paul James Mayer, IV. Respondent Admiral Beverage Corporation has no parent company, and one nonwholly owned subsidiary (Larson Beverage Company).

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OPINIONS BELOW

Respondents agree with the statements contained in this section of Petitioner's Brief, except that the opinion of the United States Court of Appeals for the Eighth Circuit is reported in *Wisland v. Admiral Beverage Corp.*, 119 F.3d 733 (8th Cir. 1997), rather than 119 F.2d, as stated in Petitioner's Brief.

STATEMENT OF JURISDICTION

Again, Respondents have no quarrel with the Petitioner's statements contained in this section of their Brief, with the exception of the incorrect citation to the opinion of the Eighth Circuit. While Respondents agree that 28 U.S.C. § 1254(1) and Supreme Court Rule 13 would confer jurisdiction on the Court should it accept this case for review, they obviously do not agree that this case is in fact appropriate for review.

STATUTORY PROVISIONS AND RULES

Respondents do not agree that Federal Rule of Civil Procedure 6(b) is applicable to the issues presented by this case. In addition to the statutory provisions cited by Petitioner, Respondents respectfully direct the Court's attention to the following:

28 U.S.C. § 1391(c) provides:

> For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is

subject to personal jurisdiction at the time the action is commenced. In a state which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

STATEMENT OF THE CASE

The motorcycle accident which forms the basis for this lawsuit occurred in South Dakota on August 5, 1991. Petitioner claims that the motorcycle accident was caused by the negligence of Respondents. At the time of the accident, Petitioner was a Wisconsin resident. Respondent Admiral Beverage was a Wyoming Corporation with its principal place of business in Wyoming. Admiral Beverage conducted business in South Dakota, and had a registered agent for service of process there. Respondent Paul James Mayer, IV, resided in South Dakota.

Petitioner filed her Summons and Complaint with the Clerk of Court for the United States District Court, Western District of Wisconsin, on August 4, 1994. However, Admiral Beverage had never conducted business in Wisconsin. Paul James Mayer, IV, had never set foot in Wisconsin.

Although Petitioner's Summons and Complaint were filed-stamped by the Wisconsin District Court on August 4, 1994, copies of those documents did not come into the hands of the process servers in South Dakota until August 9, 1994. Petitioner's Summons and Complaint were actually served upon both Admiral's registered agent in South Dakota and Paul James Mayer, IV, on August 10, 1994. Petitioner's counsel did not file the original Affidavits of Service with the Court until April 11, 1996. *See* App. 1 through 4.

Wisconsin counsel filed a document on behalf of Respondents entitled "Motions and Answer" on August 22, 1994. In that document, Wisconsin counsel moved to dismiss Petitioner's lawsuit based upon lack of personal jurisdiction and improper venue. Thereafter, the parties stipulated to transfer the lawsuit to the United States District Court for the District of South Dakota. The last sentence of the stipulation noted that "[t]he parties agree that by virtue of the present stipulation, they do not waive any defenses or claims which may be asserted in the United States District Court for the District of South Dakota."

After the case was transferred to the United States District Court for the District of South Dakota, Respondents' South Dakota counsel made a motion to amend the Answer to assert a statute of limitations defense and a motion for summary judgment based upon the South Dakota statute of limitations. The district court allowed the proposed amendment, and counsel thereafter served and filed an Amended Answer, asserting a statute of limitations defense. After briefing and oral arguments, the district court issued a Memorandum Opinion and

entered an Order granting Respondent's motion for summary judgment based on the statute of limitations. Petitioner then appealed to the Eighth Circuit Court of Appeals. After briefing and oral arguments, the Eighth Circuit Court of Appeals affirmed the district court. Petitioner's Petition for Rehearing was denied.

I. Objections to Petitioner's Statement of the Case

A. Respondent objects to the entirety of Petitioner's Statement of the Case to the extent that it contains improper argument rather than a "concise statement of the case containing the facts material to the consideration of the questions presented" as required by Supreme Court Rule 14(1)(g).

B. Petitioner's statement that Admiral Beverage was a "resident" of Wyoming for venue purposes is incomplete because 28 U.S.C. § 1391(c) explains that, for purposes of venue, a corporation is a "resident" of any judicial district in which it is subject to personal jurisdiction. Thus, in this case, Admiral Beverage was a resident of South Dakota for venue purposes.

C. Petitioner incorrectly states that her damages are not disputed; Respondents' Answer denied the nature and extent of Petitioner's damages and remitted her to her strict proof thereof.

D. Petitioner misstates South Dakota law regarding the tolling of the statute of limitations. In South Dakota, a lawsuit is barred if not "commenced" prior to the expiration of the statute of limitations. It is correct that a lawsuit is deemed "commenced" for statute of limitation

purposes when the summons is served upon the defendant. However, an attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered to the sheriff or other officer of the county in which the defendant resides, so long as it is actually served upon the defendant within sixty days. In this case, the Respondents were served within sixty days of filing and of the date the constable received the Summons, *but* the Summons was not delivered to the constable prior to the expiration of the statute of limitations. Thus, the critical date in this case was not when the Respondents were served, but rather when the Summons was delivered to the South Dakota constable.

ARGUMENT

I. THE DECISIONS BELOW ARE CORRECT.

A. The District Court And The Eighth Circuit Court Of Appeals Correctly Held That Venue Was Improper In Wisconsin.

The district court and the Eighth Circuit held that South Dakota law applies to this lawsuit. Of course, Petitioner's claim is barred by the statute of limitations under South Dakota law. The basis for holding that South Dakota, rather than Wisconsin law applies is that venue was improper in Wisconsin, resulting in a transfer to South Dakota pursuant to 28 U.S.C. § 1406. Petitioner now argues that venue was proper in Wisconsin and that Wisconsin law should apply to this case. However, venue was clearly improper in Wisconsin.

28 U.S.C. § 1391 reads in relevant part as follows:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
>
> * * *
>
> (c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced . . .

Because both Respondents are residents of South Dakota for venue purposes, venue was proper in South Dakota. In her Brief, Petitioner states that Respondent Admiral Beverage is a resident of Wyoming. However, the above-cited statute makes clear that Respondent Admiral Beverage is also a resident of South Dakota for venue purposes.

Next, Petitioner argues that venue was indeed proper in Wisconsin because that is where she received medical treatment for the injuries she attributes to the motorcycle accident. Petitioner argues that her medical treatment rises to the level of "a substantial part of the events or omissions giving rise to the claim" pursuant to

§ 1391(a)(2). This argument is clearly meritless. It is notable that Petitioner cites *no* authority for the proposition that the receipt of medical treatment in a plaintiff's home state transforms the plaintiff's home state into the proper venue for her personal injury action. This writer could find only one case in which a similar argument was made. In *Smith v. Fortenberry*, 903 F.Supp. 1018 (E.D. La. 1995), the plaintiff, a Louisiana resident, brought his lawsuit in Louisiana after being involved in an auto accident in Mississippi with a Mississippi resident. The plaintiff claimed venue was proper in Louisiana because he received the majority of his medical treatment there. The district court in Louisiana flatly rejected such an argument, stating,

> The Court finds that plaintiff's contention flies in the face of the pertinent, plain language of § 1391(a)(2) that venue is proper in 'a judicial district in which a *substantial part of the events or omissions giving rise to the claim* occurred.' The events or omissions giving rise to the plaintiff's claim involved the alleged negligence of [the defendants'] accident in Mississippi, which gives rise to the plaintiff's claim for injuries.

Id. at 1020. The district court went on to refer to the plaintiff's venue theory as a "misguided epiphany." *Id.* at 1021. Clearly then, the fact that Respondent received her medical treatment in Wisconsin does not render Wisconsin the proper venue for her lawsuit.

Petitioner cites *Dahlberg v. Harris*, 916 F.2d 443 (8th Cir. 1990), *Winnebago Tribe of Nebraska v. Babbitt*, 915 F.Supp. 157 (D.S.D. 1996), and *Ferens v. John Deere Company*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990)

in support of her argument that venue of her lawsuit was proper in Wisconsin. However, none of those cases hold that the receipt of medical care constitutes a "substantial part of the events or omissions giving rise to the claim." Moreover, there are many distinctions between those cases and this case, the most important of which is that in each of those cases, personal jurisdiction was apparently a non-issue.

In this case, venue was improper in Wisconsin because the Wisconsin courts did not have personal jurisdiction over either Respondent. It must be remembered that Admiral Beverage has never done business in Wisconsin. Paul James Mayer, IV, has never even visited Wisconsin. Therefore, the principles of due process clearly prohibit Petitioner from hailing either Respondent into court in Wisconsin or subjecting them to Wisconsin law because the Wisconsin courts have no personal jurisdiction over them. *See, International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *See also, Stauffacher v. Bennet*, 969 F.2d 455 (7th Cir. 1992), *cert. den.*, 506 U.S. 1034, 113 S.Ct. 814, 121 L.Ed.2d 686 (1992) and *Mid-States Mortgage Corp. v. Louie*, 841 F.Supp. 871 (E.D. Wis. 1993) (both defining the parameters of personal jurisdiction of Wisconsin courts).

Petitioner's argument that venue was proper in Wisconsin completely ignores a fundamental concept of law; venue cannot lie in a district where there is no personal jurisdiction over the defendants. *See, Richards v. Aramark Services, Inc.*, 108 F.3d 925 (8th Cir. 1997); *Naegler v. Nissan Motor Co., Ltd.*, 835 F.Supp. 1152 (W.D. Mo. 1993); *Obermeyer v. Gilliand*, 873 F.Supp. 153 (C.D. Ill. 1995). Thus, the

district court and the Eighth Circuit correctly held that venue was improper in the district court for Wisconsin.

B. The District Court And The Eighth Circuit Court Of Appeals Correctly Allowed Respondents To Amend Their Answer To Assert A Statute Of Limitations Defense.

FRCP 15(a) provides in relevant part:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Respondents moved the district court for leave to amend their Answer to assert the statute of limitations defense. Because the statute of limitations is clearly a meritorious defense in this case, justice required that Respondents' motion for leave to amend be granted.

At the outset, it should be noted that "[i]t is clearly within the trial court's sound discretion to grant leave to amend pleadings." *Groninger v. Davison*, 364 F.2d 638, 640 (8th Cir. 1966). Further, "Rule 15 provides for liberality in permitting the parties to amend their pleadings to conform to the evidence 'even after judgment.'" *Id.* In *Groninger*, the Eighth Circuit upheld the Iowa district court's decision to allow the defendant to amend its Answer after the pretrial conference to assert a statute of limitations defense. Further, the Eighth Circuit also affirmed the district court's subsequent grant of the defendant's motion for summary judgment based upon the statute of limitations. *Groninger* is factually similar to the case at bar, and the outcomes should likewise be the same.

Specifically, *Groninger* involved a personal injury action which was in federal court by virtue of diversity of citizenship. The plaintiff filed her Complaint with the Clerk in time to comply with the statute of limitations, but did not deliver the suit papers into the hands of the proper officials until a day *after* the statute ran. Iowa law, like South Dakota law, requires the suit papers to be delivered to the hands of the process server prior to the expiration of the statute of limitations.

As in *Groninger*, the district court and the Eighth Circuit allowed Respondents leave to amend their Answer to assert the valid statute of limitations defense. The Eighth Circuit found no abuse of discretion in the *Groninger* court's allowance of the proposed amendment, even *after* the pretrial conference. In this case, the motion to amend was made long before the pretrial conference, and a trial date had not been set. Therefore, the Eighth Circuit correctly held that the district court was well within its discretion in granting Respondents' motion to amend.

Further, the Eighth Circuit has also held that the denial of a motion to amend is an abuse of discretion if the proposed amendment presents a non-frivolous claim or defense. *See, Karl's, Inc. v. Sunrise Computers, Inc.*, 901 F.2d 657 (8th Cir. 1990). "A court should deny leave to amend pleadings because of a perceived unlikelihood of succeeding on the merits *only* when the party asserts clearly frivolous claims." *Id.* at 659 (emphasis added). Likewise, the statute of limitations defense asserted by Respondents in this case was certainly not "clearly frivolous." Therefore, Respondents' motion to amend was properly granted. Other Circuits have also recognized

that leave to amend an answer to assert the statute of limitations should be freely given. *See, e.g., Joplin v. Bias*, 631 F.2d 1235 (5th Cir. 1980) (allowing defendant to amend its answer to assert statute of limitations defense and then granting defendant's motion for summary judgment). In *Joplin*, the defendants moved to amend their answer two and one-half years after the lawsuit was commenced. The Fifth Circuit noted, "[w]e affirm the Judge's decision to allow the filing of [defendant's] amended answer which raised the limitation statutes as a defense since no abuse of discretion was found." *Id.* at 1237.

The trial court's allowance of defendant's motion to amend its answer to assert a statute of limitations defense only eleven days prior to trial was affirmed in *Guthrie v. J.C Penney Co., Inc.*, 803 F.2d 202 (5th Cir. 1986). The Fifth Circuit noted, "[t]he trial court's decision to grant or deny leave to amend will be overturned only for abuse of discretion. The district court may deny leave to amend only if it finds 'a substantial reason' such as a dilatory purpose or unfair prejudice to the opposing party." *Id.* at 210. The Fifth Circuit also noted that the defense raised no new factual issues and that eleven days was enough to research the legal issues involved. *Id.* Finally, the Court noted, "the prejudice to [defendant], had it been precluded from utilizing the statute of limitations, outweighs any prejudice to [plaintiff]." *Id.* Likewise, any prejudice which might be claimed by Petitioner in this case is clearly outweighed by the potential prejudice to Respondents had their motion been denied, in that the statute of limitations clearly presents a meritorious defense which serves as a complete bar to this lawsuit.

In her Brief, Petitioner argues that Respondents should not have been allowed to amend their Answer because the Rule 16(b) Scheduling Order deadline for amendments to pleadings had passed and because she alleges that there was no showing of "good cause." She further erroneously states that the district court "specifically made a finding to the contrary."

Clearly, the mandates of Rule 15(a) require that leave to amend should be freely given, regardless of the strictures of the Rule 16(b) Scheduling Order. Otherwise, amendments would surely never be allowed to conform to the evidence at trial or after entry of judgment. *See Groninger, supra.* Also, other courts have specifically held that the mandates of Rule 15(a) prevail over the requirements to amend a Rule 16(b) scheduling order. *See, Fishbein Family Partnership v. PPG Industries, Inc.*, 871 F.Supp. 764 (D.N.J. 1994).

In her Brief, Petitioner bases a large part of her argument upon oral statements made by Judge Jones during the hearing on Respondents' motion to amend. Specifically, Petitioner argues that Judge Jones' comments to the effect that there was "no excusable neglect" mandated a denial of Respondent's motion to amend. This argument is flawed in several respects. First, to the extent that the district court's statements from the bench conflict with its formal Order, the oral statements should be disregarded. *O'Neill v. Agwi Lines*, 74 F.3d 93 (5th Cir. 1996); *Equal Employment Opportunity Commission v. Exxon Shipping Co.*, 745 F.2d 967 (5th Cir. 1984). Alternatively, the Eighth Circuit has held that "[a] district court may, however, in its discretion, allow amendments to pleadings

even after unexcusable delay if there has been no prejudice to the other party." *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 485 (8th Cir. 1992).

Respondents certainly do not intend to concede neglect, excusable or otherwise, on their part. It must be remembered that the documents which would have shed light upon the fact that Respondents had a valid statute of limitations defense were *not* filed with the Court (as required by FRCP 4(1)) until April, 1996. The Summons was file-stamped by the Wisconsin district court on August 4, 1994. Respondents were aware they were personally served with the suit papers on August 10, 1994. However, the crucial date pursuant to South Dakota law is the date the Summons and Complaint were *received* by the process servers. The Affidavits of Service, which were presumably held in Petitioner's counsel's file, were the *only* documents which revealed that the Summons and Complaint did not come into the hands of the Constables until after the statute of limitations had run. These Affidavits of Service were improperly held in Petitioner's counsel's file, rather than having been filed pursuant to FRCP 4. Thus, Petitioner should certainly not be heard to claim any prejudice by Respondents' motion. Likewise, the fact that the documents were improperly held in counsel's file rather than filed with the district court is in and of itself sufficient to show "good cause" for allowing Respondents to amend their Answer after the Rule 16 deadline had passed.

A similar situation was presented in *Havoco of America, Ltd. v. Hilco, Inc.*, 750 F.Supp. 946 (N.D. Ill. 1990), *aff'd*, 971 F.2d 1332 (7th Cir. 1992). In that case, the defendants moved to amend their answer to assert the affirmative

defense of release after the lawsuit had been pending for nine years. In *Havoco*, the plaintiff had been in possession of the release which was the subject of the defendant's motion to amend, but had *not* provided it to defendants. "Moreover, [plaintiff] has known about this release for approximately fourteen years. If [plaintiff] failed to anticipate that the defendants might raise the release as a defense at some point, [plaintiff] has only itself to blame." *Id* at 959. Similarly, Petitioner's counsel was in sole possession of the Constables' Affidavits of Service since the inception of this lawsuit. Thus, as in *Havoco*, Petitioner can hardly claim prejudice by Respondents' delayed discovery of the content of those documents.

In summary, Respondents clearly had a valid statute of limitations defense. FRCP 15(a) mandates that leave to amend pleadings should be freely given when justice so requires. Given the circumstances of this case, justice clearly required that Respondents be allowed to amend their Answer to assert this defense, and the Eighth Circuit properly held that the district court was well within its discretion in allowing Respondents' requested amendment.

II. THIS CASE DOES NOT PRESENT ISSUES APPROPRIATE FOR THIS COURT'S REVIEW UNDER A PETITION FOR WRIT OF CERTIORARI.

Supreme Court Rule 10 discusses the considerations governing this Court's review on certiorari. That rule indicates that a petition for writ of certiorari will be granted only for "compelling" reasons. There are no such

"compelling" reasons in this case. Indeed, the Petitioner's Brief fails to cite any of the Rule 10 reasons which would justify this Court's review of this case. Rather, the Petitioner apparently submitted her petition based solely upon her dissatisfaction with the decisions below. However, the district court and the Eighth Circuit decided this case by applying the undisputed facts to well-established principles of law.

Petitioner's theory that venue was proper in Wisconsin because that is where she received medical treatment is clearly meritless. More importantly, it is a fundamental principle of law that venue cannot lie where there is no personal jurisdiction. In this case, the Wisconsin district court had no personal jurisdiction over Respondents. Thus, for the Court to even entertain the baseless proposition that Petitioner's medical treatment in Wisconsin constitutes a "substantial part of the events or omissions giving rise to the claim" would be an exercise in futility because venue was clearly improper for other reasons.

Likewise, whether to allow an amendment to pleadings is a highly discretionary decision. Given the particular facts of this case, there is simply no reason for this Court to review that exercise of discretion.

CONCLUSION

Respondents respectfully request the Court to deny the Petition for Writ of Certiorari because the decisions below were proper and because the case presents no appropriate issue for the Court's review.

Respectfully submitted this 9th day of January, 1998.

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STATE OF SOUTH DAKOTA)
) SS
COUNTY OF PENNINGTON)

IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RHONDA R. WISLAND, Plaintiff, vs. ADMIRAL BEVERAGE CORP. and PAUL JAMES MAYER, IV, Defendants	CASE NO. 94-C-0576 C AFFIDAVIT OF SERVICE (Filed April 11, 1996)

I, JOHN GLODT, Constable of Pennington County, South Dakota hereby certify and return that the annexed SUMMONS IN A CIVIL ACTION & COMPLAINT came into my hands on the 9th day of August 1994, and that I served the same on Jim Wylie as Registered Agent for Admiral Beverage Corp. personally by delivering to and leaving ~~a copy~~/copies thereof with Jim Wylie, at office, 1511 Turbine Dr., Rapid City in Pennington County, South Dakota, on the 10th day of August, 1994.

That the costs of service herein are as follows:

Summons	X	Notice	
Complaint	X	Subpoena	
Affidavit		Endeavors	
Order		Service	$ 20.00

Motion	___	Mileage	10 @ .30	$ 3.00
Petition	___	Tax		$ 0
Garnishment	___	Total Fees		$ 23.00

/s/ John Glodt
John Glodt, Constable –
Pennington County

Subscribed and sworn in before me this 10th day of August, 1994.

/s/ Aaron Klapkin
Notary Public

Aaron Klapkin
NOTARY PUBLIC
State of South Dakota
My Commission Expires
(Seal) [Date Illegible]

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF PENNINGTON)

IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RHONDA R. WISLAND, Plaintiff, vs. ADMIRAL BEVERAGE CORP. and PAUL JAMES MAYER, IV, Defendants	CASE NO. 94-C-0576 C AFFIDAVIT OF SERVICE (Filed April 11, 1996)

I, AARON KLAPKIN, Constable of Pennington County, South Dakota, and as an Elector in the State Of South Dakota, hereby certify and return that the annexed SUMMONS IN A CIVIL ACTION & COMPLAINT came into my hands on the 9 day of August 1994, and that I served the same on Paul James Mayer, IV personally by delivering to and leaving ~~a copy~~/copies thereof with Paul James Mayer, IV at 313 Tinton Road, Spearfish, in Lawrence County, South Dakota, on the 10 day of August, 1994.

That the costs of service herein are as follows:

Summons	X	Notice	____
Complaint	X	Subpoena	____
Affidavit	___	Endeavors	
Order	___	Service	$ 38.50

Motion	___	Mileage	104 @ .30	$ 31.20
Petition	___	Tax		$ 0
Garnishment	___	Total Fees		$ 69.70

/s/ Aaron Klapkin
Aaron Klapkin, Constable –
Pennington County

Subscribed and sworn in before me this 10th day of August, 1994.

/s/ John Glodt
Notary Public

John Glodt
NOTARY PUBLIC
STATE OF SOUTH DAKOTA
My Commission Expires
(Seal) November 14 1994